When Mr. Ponniah addressed the court, he did not refer to *In re National Motor Mail-Coach Co. Ltd.*, presumably because he realised by then that that case was irrelevant to the present suit as it was only held in that case that the mere fact that a promoter paid the registration fees and *ad valorem* stamp duty on the registration of a company did not in itself entitle him to recover them from the company. Counsel then referred to section 4(3) of the Civil Law Act, 1956, but submitted that the provisions therein were only concerned with the administration of insolvent estates and winding up of companies. I would pause here to point out that that submission was totally unacceptable in view of the judgment of Seah F.J. in the Federal Court case of *Nouvau Mont Dor (M) Sdn. Bhd.* v. *Faber Development Sdn. Bhd.*[4] in which His Lordship had clearly pointed out that the law on assignment is governed by section 4(3) of the Civil Law Act, 1956. Mr. Ponniah then stated that the notice in this case was given after six months. Here again I would pause to point out that the assignment agreement in this case was dated July 15, 1983, and the notice in writing was dated September 20, 1983, and that in the said affidavit affirmed by Mr. Ponniah himself on August 21, 1984, it was not stated that the notice was given after six months. Mr. Ponniah then submitted that even if there was consideration there was no intention on the part of the assignee to create legal relationship with the debtor. It was therefore his contention that there was no debt and therefore no assignment to the plaintiff.

Having considered the arguments of counsel and also having considered the various affidavits and pleadings filed in his case, I was satisfied that the defendant was indebted to His Royal Highness in the sum of $120,000 and that there was an assignment in writing of the debt in this case under the hand of the assignor, that is, D.Y.M.M. Yang Di-Pertuan Besar Tuanku Ja'afar ibni Al Marhum Tuanku Abdul Rahman. The assignment was absolute and did not purport to be by way of charge only. Express notice in writing of the said assignment was also given to the debtor, that is, the defendant in this case from whom the said assignor would have been entitled to claim the debt or thing in action. The provisions of section 4(3) of our Civil Law Act, 1956, have been complied with and there was no defence to the plaintiff's claim. I therefore allowed the appeal by the plaintiff against the decision of the learned Senior Assistant Registrar and ordered that the plaintiff be granted leave to sign final judgment against the defendant for the sum of $120,000 with interest at the rate of 8% per annum from October 15, 1983, to the date of payment and costs.

Appeal allowed.

Solicitors: *Skrine & Co.; Stanley Ponniah, Ng & Soo.*

BANK BUMIPUTRA MALAYSIA BERHAD v. DARNAZ ENTERPRISE SDN. BHD. & ORS.

[O.C.J. (Gunn Chit Tuan J.) June 27, August 29 & December 30, 1985]

[Kuala Lumpur – Civil Suit No. C356 of 1982]

Contract – Overdraft facilities – Guarantee – Plaintiff filed suit against defendants – Defendants filed claim against 2nd third party for indemnity against plaintiff's claim and costs – 2nd third party one of the joint and several guarantors – Application by 2nd third party to strike out defendants' statement of claim.

Practice and Procedure – Third party proceedings – Guarantee – Application by 2nd third party to strike out defendants' claim – R.H.C. 1980, O. 18 r. 19.

Banking – Overdraft facilities – Guarantee – Indemnity.

On February 26, 1982, Bank Bumiputra Malaysia Berhad (the plaintiff) filed a suit against the first defendant as the principal debtor on three overdraft facilities to the extent of $350,000, $150,000 and $150,000 respectively, making a total of $650,000. The second to fifth defendants jointly and severally guaranteed the aforesaid overdraft facilities by executing a letter of guarantee to that effect. The defendants subsequently brought third party proceedings on May 21, 1982 against the 1st and 2nd third parties. In the case of the 2nd third party the defendants claimed against him to be indemnified against the plaintiff's claim and costs in this suit on the grounds that the 2nd third party was one of the joint and several guarantors to the aforesaid guarantee.

On February 6, 1984 the 2nd third party applied by summons-in-chambers to strike out the statement of claim of the defendants under Order 18 rule 19 of the Rules of the High Court, 1980.

Held: (1) in this case the principal debtor, that is, the first defendant, has not paid the creditor, that is, the plaintiff, the principal sum and interest or any part thereof, and has no cause of action against the surety, that is, the 2nd third party. A surety against whom an action is brought on his guarantee may obtain indemnification by issuing a third party notice against the principal debtor, but while the surety can call in the principal debtor, the principal debtor cannot call in the surety;

(2) the 2nd third party's co-sureties, that is, the second to the fifth defendants, also do not have a cause of action against him because they have not each paid anything to the creditor. A surety is not entitled to call upon his co-surety for contribution until he has paid more than his portion of the debt due to the principal creditor, even though the co-surety has not been required by the creditor to pay anything, provided the co-surety has not been released by the creditor.

Cases referred to:

(1) *Re Kitchin, ex parte Young* (1881) 17 Ch. D. 668 at 670, C.A. per James L.J.

(2) *Re Snowdon, ex parte Snowdon* (1881) 17 Ch. D. 44, 47.

CIVIL SUIT.

Kong for the plaintiff.
Mrs. Jegathesan for all defendants.
Tan Poh Meng for 2nd third party.

Cur. Adv. Vult.

Gunn Chit Tuan, J.: Y.B. Abdul Ghaffar Baba (the 2nd third party) applied by summons-in-chambers dated February 6, 1984 (enclosure 23) to strike out the statement of claim of Darnaz Enterprise Sendirian Berhad (the first defendant). Mohamed Nazar Nong, Ahmad Khairuddin Jamaluddin, Azmil bin Nong and Baharom Shah bin Saad (the second to fifth defendants) under Order 18 rule 19 of the Rules of the High Court, 1980.

The case arose out of a suit filed by Bank Bumiputra Malaysia Berhad (the plaintiff) on February 26, 1982, against the first defendant as the principal debtor on three overdraft facilities to the extent of $350,000, $150,000 and $150,000 respectively, making a total of $650,000. The second to the fifth defendants jointly and severally guaranteed the aforesaid overdraft facilities by executing a letter of guarantee to that effect (exhibit AGB-1 to the affidavit of Abdul Ghaffar Baba affirmed on January 21, 1984 – enclosure 22).

The defendants subsequently brought third party proceedings on May 21, 1982, against Kita Construction Sendirian Berhad (now known as Perlombongan Kita Sendirian Berhad – the 1st third party) and the 2nd third party. In the case of the 2nd third party the defendants claimed against him to be indemnified against the plaintiff's claim and costs in this suit on the grounds that the 2nd third party was one of the joint and several guarantors to the aforesaid guarantee (see paragraph 4 of the Third Party Notice marked enclosure 5).

Mr. Tan Poh Meng, counsel for the 2nd third party referred to the defendant's statement of claim against the 1st and 2nd third party (enclosure 13) and stated that the defendant's alleged facts in support of their claim for an indemnity might be grouped into two categories. The first category on the guarantee could be found in paragraphs 6 and 7 of the defendants' statement of claim in which it was averred that by virtue of the fact that the 2nd third party was one of the joint and several guarantors who had signed the said letter of guarantee, he was liable to indemnify all the defendants against the plaintiff's claim. The second category on undue influence could be found in paragraphs 8 to 11 of the defendants' statement of claim in which it was averred that the 2nd third party by virtue of his majority shareholding of 200,000 units of $1 each unit of fully paid up shares in cash in the first defendant, and as a member of Parliament and holder of position of power in the Government, had used undue influence on the second to fifth defendants to prevail on them to procure overdraft facilities from the plaintiff for the use of the first defendant and had also compelled them to act as guarantors for the overdraft facilities and to sell the first defendant to the said 1st third party.

As regards the guarantee, Mr. Tan pointed out that the 2nd third party had acknowledged that he was a director of the first defendant with the majority shares and was one of the joint and several guarantors (see paragraphs 3 and 5 of the defence of the 2nd third party dated July 2, 1983 – enclosure 14). Those facts were not in dispute right from the beginning although the defendants did not seem to have appreciated them. It was the submission of counsel that those facts were of no assistance to the defendants and disclosed no reasonable cause of action against the 2nd third party.

Counsel also submitted that the first defendant, as principal debtor under the said guarantee, was primarily liable and could not have a cause of action against its own guarantors to compel payment to the lender. In fact the 2nd third party was entitled to be indemnified by the first defendant for the monies paid by him. On a surety's right to indemnity against a principal debtor, counsel referred to paragraph 4455 in Volume II of *Chitty* on Contracts (25th. Edition) in which it is stated that a surety who has actually met the liability

which he has undertaken to answer for is entitled to be indemnified by the principal debtor. Counsel also pointed out that the 2nd third party had paid the plaintiff the sum of $305,000 as at May 31, 1985 (see the affidavits of the 2nd third party affirmed on March 4, 1985, and June 6, 1985, respectively – enclosures 30 and 36).

As for the second to fifth defendants, Mr. Tan also submitted that they as co-guarantors with the 2nd third party have no cause of action against him. They could only claim contribution from the 2nd third party if they have paid money under the guarantee in excess of their shares; but they have not paid a single cent to the plaintiff and in fact it was the 2nd third party who has a claim against them for contributions. In support of that submission counsel referred to the following paragraphs 4459 and 4461 in Volume II of *Chitty* on Contracts (25th. Edition):

"*Surety's right to contribution from co-sureties.* It is an old rule of equity that a surety is entitled to contribution from his co-sureties so that none of them should be required, as between themselves, to pay more than his due share. ... The equitable right to contribution arises where the sureties are joint, joint and several, or several: and whether they are liable on the same or different instruments.

Amount of contribution. The equitable rule is that *prima facie* all sureties are required as between themselves to contribute to the liability equally, ... At common law, the amount of contribution to which a co-surety was entitled depended on the number of sureties originally liable. So that if there were three sureties and one of them paid the whole debt, he could not recover more than a third from a second surety even though the third surety was insolvent. But in equity the amount of contribution depends on the number of solvent sureties at the time when contribution is sought, so that in the above case contribution of half the debt could be ordered, and the equitable rule now prevails."

Finally on the allegations of undue influence, Mr. Tan submitted that they were wild and unsubstantiated and that not a shred of evidence has been adduced in court. In fact the defendants had admitted that they had tried their best to secure banking facilities from numerous banks but were unsuccessful (vide paragraphs 4(vi) of the affidavit of the second and fourth defendants affirmed on January 8, 1985 – enclosure 29). Counsel stated that the defendants themselves were anxious for such facilities and had relied on the 2nd third party, and that it was absurd to suggest at the same time that they were forced to apply for the overdraft facilities from the plaintiff and compelled to stand as guarantors because they were directors of the first defendant. Counsel also stated that bankers invariably insist on personal guarantees of the directors of a company applying for banking facilities and that there was nothing sinister about it.

Mrs. Jegathesan, counsel for the defendants, conceded that the plaintiff bank could elect to sue any particular guarantor. In this case only the second to fifth defendants were sued and that was why the Third Party Notice was issued against the 1st and 2nd third party. Counsel then referred to section 99 of the Contracts Act, 1950 (Revised – 1974) on the liability of co-sureties to contribute equally. Then after referring to the said affidavit of the second and fourth defendants (enclosure 29), counsel contended that the 2nd third party should not have informed the court about how much he had paid the creditor.

In this case the principal debtor, that is, the first defendant, has not paid the creditor, that is, the plaintiff, the principal sum and interest or any part thereof, and has no cause of action against the surety, that is, the 2nd third party. A surety against whom an action is brought on his guarantee may obtain indemnification by issuing a third party notice against the principal debtor, but while the surety can call in the principal debtor, the principal debtor cannot call in the surety (*Re Kitchin, ex parte Young*).[1] The 2nd. third party's co-sureties, that is, the second to the fifth defendants, also do not have a cause of action against him because they have not each paid anything to the creditor. A surety is not entitled to call upon his co-surety for contribution until he has paid more than his portion of the debt due to the principal creditor, even though the co-surety has not been required by the creditor to pay anything, provided the co-surety has not been released by the creditor (*Re Snowdon, ex parte Snowdon*).[2]

Having considered the evidence adduced and the submissions of counsel in this case, and for the above reasons, I therefore allowed the 2nd third party's application with costs to strike out the defendants' statement of claim against him under Order 18 rule 19 of the Rules of the High Court, 1980.

Application allowed.

Solicitors: *Kadir, Tan & Ramli; S.S. Jegathesan & Co.; Nik Hussain, Ibrahim & Abdullah.*